Whose responsibility to protect whom?: the notion of "responsibility to protect" in international politics

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Whose Responsibility to Protect Whom?
The Notion of "Responsibility to Protect" in International Politics*

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"It is now well established in international law and practice that sovereignty does not bestow impunity on those who organize, incite or commit crimes relating to the responsibility to protect", reads the Report of the Secretary General of the United Nations on *Implementing the Responsibility to Protect*[1]. However, there is no consensus, so far, neither among the IR and international law theorists, nor among states, on the precise relationship between sovereignty and intervention, on the appropriate means of reaction to situations of genocide, war crimes, crimes against humanity or ethnic cleansing. These four situations appear in the documents of the UN General Assembly that refer to the responsibility to protect: in other words, this is the field covered by this emerging norm of international soft law. The reflection upon this issue has begun with the new millennium and has, until now, reached a few landmarks which are useful to recall in order to grasp the crystallization of this new concept. Moreover, the so-called "Arab spring" in 2010-2011 offered the opportunity for this idea to be tested in a manner that is very significant for its conceptual weight. Thus, R2P is a very present topic in nowadays political discourse and reflection. UN SC Resolution no. 1973/17.03.2011 on the situation in Libya is the first time in history when the Security Council authorizes the use of force for the protection of civilians *without* the consent of the concerned State. However, this is an exceptional situation, since the doctrine of the responsibility to protect foresees three mail pillars of the notion: first of all, it is the State itself who is responsible to protect its citizens; if the State is not able to do it, it may appeal to the international community; and finally, if it is neither able, nor willing to do it, the responsibility is moved to the international community[2]. The international reaction is thus the ultimate resort both from a legal and a political point of view: legally, it is a suspension of the norm of sovereignty in favor of the principle of intervention; while politically, it is an answer to a situation in which the State loses its main function, which is, in Weberian terms, the monopoly over legitimate violence.

The purpose of this article is twofold. First, we will try to show how the idea of the "responsibility to protect" gained terrain in the circles of international lawyers and theorists during the last ten years, as well as the very debatable issues raised by

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[1] UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary General*, A/63/677, 12 January 2009, available at http://www.unhcr.org/refworld/docid/4989924d2.html, retrieved on 20 February 2012, § 54.

[2] *Ibidem*.

it. Secondly – and this constitutes the stake of our approach – we will address the broader discussion of the link between R2P and the problem of state sovereignty, by arguing that the emergence of this new international obligation is merely a hypostasis of a general *malaise* of the traditional state sovereignty. We will then conclude by assessing the impact of the new norm of R2P to the recent political developments in the Middle East, in order to grasp the direction into which the practice is evolving in this field.

BETWEEN LAW AND POLITICS. THE EMERGENCE OF THE CONCEPT

The emergence of the concept of "R2P" in international law is linked to the more and more visible process through which the individual becomes a subject of international law. The state ceases to be the exclusive subject of this body of law. National jurisdictions often make "the justice of the victors", and are therefore unreliable, in cases such as war crimes, genocides, crimes against humanity and ethnic cleansing. But those who commit such crimes should not remain unpunished, and therefore international instances are considered more "just" and "legitimate" than the national ones[1]. This is why, in the aftermath of the *ad hoc* courts for the former Yugoslavia and Rwanda, the International Criminal Court has been created in 1999, which is competent to judge individuals accused of those crimes. But *post hoc* justice can do nothing for the victims: this is why the question arose of the possibility to *prevent* those crimes. New ways to make the state more responsible – and ultimately more accountable – are sought for. International criminal justice is one aspect of this process which has as a result the declining of State sovereignty; the doctrine of the responsibility to protect is another. In the first case, the state is overlooked in its capacity to do justice to the victims and punish the perpetrators. In the second case, the state is patronized by the international community, which takes in charge the protection of populations if the state is not able, or not willing, to protect them. This breach of the norm of sovereignty is a recent phenomenon which would not have been possible, for example, during the Cold War (mainly because of the bipolar structure of the international system).

This extraordinary shift in the status of sovereignty, which has been the main foundation of international law for the last 400 years, has been possible thanks to a tricky argument put forward by the supporters of the responsibility to protect. Sovereignty, they say, does not only confer rights, but it also entails obligations towards the people which accepted to be bound by the social contract[2]. The main such obligation is to protect them: thus, the principle of sovereignty is linked to the

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[1] We took the caveat to place under commas words such as "justice" and "legitimacy" in order to underline the fact that we do not assess here the pertinence of this assertion. The issue of the legitimacy of international courts is tremendously charged. A modest contribution to this debate in Ruxandra IVAN, "International Politics of Justice. The Political Underpinnings of the Emergence of an International Regime", *Studia Politica. Romanian Political Science Review*, vol. XII, no. 1, 2012, pp. 9-24.

[2] Actually, the issue of the right to resistance to an oppressive sovereign has been raised even since Jean Bodin (*Les Six Livres de la République* I.8 and III.5), but this is a too complex issue to be fully addressed here. We treated it in Ruxandra IVAN, "Problema suveranității între filosofie politică, drept internațional, istorie și relații internaționale. O schiță de abordare

duty of responsibility: if the latter is not fulfilled, the former is in its turn lessened. This justifies international intervention when a state is in breach of this duty.

Assessing the evolutions of the international criminal justice, as well as of the doctrine of the R2P, one can observe a slow, but certain evolution towards an articulation between the body of international public law and the body of human rights. These two bodies of law have not been in a hierarchical relation so far: they have been completely separate. The subject of international law is the state; the subject of human rights is, obviously, the individual. Sovereignty is the main norm of the former, while the right to life is the main norm of the latter. Putting these two bodies of law together means establishing a hierarchy between the norm of sovereignty and the right to life. This is why it is quite difficult to reconcile the two. Another theoretical difficulty arises if we try to clarify who is the subject of the duty to protect: undoubtedly, the holder of sovereignty is the state, but who is, ultimately, the holder of the duty to intervene when the state is not willing or able to do so? Of course, one might say that it is "international community", but this statement in no way diminishes the ambiguity of the problem: who is, ultimately, the international community? This is why it is essential to identify, on one hand, the way in which the notion of "R2P" has been codified in international law, in order to understand its evolution and limits as an emerging norm. On the other hand, for the cases when the state cannot or does not want to assume this responsibility, who is responsible to react? This question can be reformulated as follows: who is the most appropriate representative of the international community? Here, the legal arguments cannot (and should not) obscure political considerations, because there are several actors and institutions that could assume this role and which are in competition with one another. The UN Charter is clear enough in what concerns the repartition of competences between the Security Council and the General Assembly; but the fact that the notion of "R2P" is absent from the Charter allows for both institutions to reclaim competence, in a logic of institutional competition which exists at the UN. This competition, added to the lack of consensus among UN member states, allows for other, regional organizations to step in. In the absence of a clear reaction from the UN, these organizations can claim the role of "representatives" of the international community and its values: it was the case of NATO in Kosovo in 1999, when its intervention was carried on without previous mandate from the UN, in the name of an international responsibility to stop ethnic cleansing. The question of the actors who should be in charge of the responsibility to react when the state fails is thus very politically significant.

Legal Basis of the "Responsibility to Protect"

The notion of "R2P" made its appearance in the international political and legal language at the turn of the millennium, as the result of a semantic evolution which begun with the notion of "humanitarian intervention". At the end of the Cold War, much talk has been devoted to the "right of humanitarian intervention". But the word "intervention" was – and still is – too powerful for states to accept it as a legal norm.

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interdisciplinară", in Adrian MURARU (coord.), *Filosofia și societatea cunoașterii*, Editura Institutul European, Iași, 2012, pp. 83-102.

During the academic and political debates around this issue in the 90s, the concept of "humanitarian intervention" has evolved into "human security"[1], and finally reached its present form of "responsibility to protect"[2]. This evolution is the result of the efforts that have been made to reconcile the idea of sovereignty with the idea of intervention, and it was possible thanks to an interpretation of sovereignty in which it does not only confer rights to its holders – the states – but also bestows obligations upon them, and above all, the obligation to protect their citizens.

In September 2000, the Canadian Government created a commission for reflection upon the possibility of international intervention in cases of massive violations of human rights. This initiative followed the Brahimi Report[3] and the Report of the Secretary General of the UN before the General Assembly, which called for a consensus on this matter[4]. The International Commission on Intervention and State Sovereignty (ICISS) worked for twelve month and published its report under the title *Responsibility to Protect*[5]. This is the first occurrence of this concept intended as a possible legal basis for an international intervention in order to prevent massive violations of human rights in the states that lack the capacity or the will to fulfill their duty of protection. After having affirmed that the state itself is the first responsible to protect its citizens, the Commission goes on by asserting the "basic principle" that

> "Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect".

The same Report makes for the first time a distinction between three different pillars which will be endorsed by other international documents: the "prevention" pillar, the "assistance and capacity-building" pillar and the "reaction" pillar. In other words, a synergistic action is needed from the international community in order to deal with cases of massive human rights violation: it should first try to prevent them, and, if this proves impossible, it should react; but it also has the duty to contribute to the reconstruction of a society affected by human rights catastrophes and military intervention. The first two pillars might be the most difficult to put in practice, since complex and well-defined strategies are necessary to prevent human rights abuses and to reconstruct societies after a war; but the reaction pillar is the most delicate in terms of international law and politics. This dimension is paid particular attention in the Report, which proposes several principles for military action. We should nevertheless insist on the fact that this is a document elaborated by experts,

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[1] A.A., V.V., *Francophonie et relations internationales*, Éditions des Archives Contemporaines, Paris, 2009.

[2] We have explained in depth this transformation in Ruxandra IVAN, "Deconstructing Security", *PolSci. Romanian Journal of Political Science*, vol. XI, no. 2, 2011, pp. 105-128.

[3] *Rapport du Groupe d'étude sur les opérations de paix de l'Organisation des Nations Unies*, New York, UN, 21 August 2000, A/55/305-S/2000/809.

[4] *Report of the Secretary General on the implementation of the report of the Panel on United Nations peace operations*, New York, ONU, 20 October 2000, A/55/502.

[5] *The Responsibility to Protect. Report of the International Commission on Intervention and State Responsibility*, International Development Research Center, Ottawa, 2001.

and therefore it has no legal weight. The official texts take good care not to use this terminology of "intervention", by completely avoiding the word.

The UN reform has occupied the first page of the agenda at the beginning of the third millennium. Inserted in this broader reflection, the High-Level Panel on threats, challenges and change has elaborated the report *A More Secure World. Our Shared Responsibility*[1]. Unlike the ICISS Report, which spoke of "intervention", this report has been endorsed by the General Assembly of the UN[2], and one of the reasons might be precisely that it treats the subject in a more ambiguous manner. The 2004 reports touches the issue of the responsibility to protect under the pressure of Canada, which has asked for a reflection upon it in a non-paper submitted to the High-Level Panel[3]. Here are the terms in which the issue is addressed in the High-Level Panel report:

> "In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community. But history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbours. And in those circumstances, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be" (par. 29).
> "...the concept of State and international responsibility to protect civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to intervene..." (par. 36)[4].

It was only as late as 2005, in the outcome document of the World Summit, that the issue was positively approached by the UN, and, furthermore, a direct reference was made to the responsibility to act of the international community, if necessary, on the basis of Chapter VII of the Charter. This reference can be found at the 139th paragraph of the Document (A/60/L1):

> "139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect

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[1] *A More Secure World. Our Shared Responsibility. Report of the High-Level Panel on Threats, Challenges and Change*, New York, UN, 2004, http://www.un.org/secureworld/report2.pdf , retrieved on 20 February 2012.

[2] UN General Assembly A/59/565.

[3] *Canadian Non-Paper on the Responsibility to Protect and the Evolution of the UN's Peace and Security Mandate: Submission to the High-Level Panel on Threats, Challenges and Change*, http://www.responsibilitytoprotect.org/files/Canada_NonPaper_R2P.pdf , retrieved on 6 March, 2012.

[4] *A More Secure World*…cit.

> populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out"[1].

This text was also endorsed by the UN Security Council, which makes its first reference to the responsibility to protect in the Resolution 1674/2006: the text "reaffirms" the dispositions of Paragraphs 138 and 139 of the 2005 World Summit Outcome Document[2]. In its turn, the General Assembly "decides to continue its consideration of the responsibility to protect"[3].

What can be noticed all through the official UN documents is a certain restraint and moderation in addressing the issue. As we will show further on, this is due to the lack of consensus on the content of the responsibility to protect, on the one hand, and to the delicate political question surrounding its implementation, on the other hand.

The most important steps forward in what concerns the legitimation of the international reaction have been made after 2008. We are thinking, first of all, to the Report of the UN Secretary General *Implementing the responsibility to protect* and its endorsement by the UN General Assembly[4]. On the possibility of international reaction, the Report considers that "pillar three is generally understood too narrowly"[5]: the reaction should not constitute a last resort solution, but it should be considered in the same time with the two other pillars – prevention and assistance. The Report of the Secretary General draws a list of the instruments of action – pacific or not – at the disposal of the international community for a reaction in case of state failure. The text also specifies the criteria for the beginning of the reaction, as well as the actors that are supposed to decide and take part in the reaction. We will treat these issues in the next sections.

The latest important development in the legal practice of the responsibility to protect is UN SC Resolution no. 1973/17.03.2011 concerning the situation in Libya. It does not theoretically address the concept, as the other texts mentioned here, but "reiterates the responsibility of the Libyan authorities to protect the Libyan population" and imperatively asks for the end of the violence and abuses against the

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[1] *2005 World Summit Outcome*, Resolution adopted by the UN General Assembly, A/RES/60/1, 24 October 2005.

[2] UN SC Resolution 1674/2006, S/RES/1674, 28 April 2006.

[3] UN GA Resolution, A/RES/63/308, 7 October 2009.

[4] *Implementing the Responsibility to Protect. Report of the Secretary General*, 12 January 2009, A/63/677.

[5] *Ibidem*, p. 9.

civilians. It also authorizes member states, after notification of the Secretary General and acting either "nationally or through regional organizations or arrangements" to "take all the necessary measures" to protect civilians[1]. It is the first time when the Security Council takes position on an internal issue of one of the UN member states by allowing intervention without the consent of the concerned state, and it is also the legal basis for the NATO intervention in Libya. This document is even more salient given that the Security Council was always reluctant to getting involved in the discussion about the responsibility to protect, precisely because it is such a politically sensitive issue. However, Resolution 1973 marks the willingness of the Security Council to remain connected to the legal debate surrounding R2P. However, the events that followed NATO intervention in Libya and the numerous criticisms it encountered deterred the Council to take any further steps in this direction.

Table 1
International Documents Contributing to the Development of the Notion of "Responsibility to Protect"

Year	Document
2001	Report of the International Commission on Intervention and State Sovereignty
2004	Report of the High Level Panel for Threats, Challenges and Change, *A More Secure World. Our Shared Responsibility*
2005	Outcome Document of the 2005 World Summit, paragraphs 138 and 139
2006	Resolution 1674 of the UN Security Council
2009	Report of the UN Secretary General, *Implementing the Responsibility to Protect*
2009	Resolution 63/308 of the UN General Assembly
2011	Resolution 1973 of the UN Security Council.

Except for the latter, the reports and resolutions mentioned here do not constitute a constraining source of law; they are what lawyers call "soft law". This is why the advocates of the responsibility to protect have looked for firmer foundations of legitimacy. The Report of the Secretary General (A/63/677 of 12 January 2009) recalls three types of procedures that can be engaged in cases where the international community or part of it decides to take on this responsibility: either an authorization of the UN Security Council based on articles 41 or 42 of the Charter[2], or the General Assembly based on articles 11, 12, 14 and 15 of the Charter[3], or regional or sub-regional organizations based on article 53 of the Charter and after the approval of the Security Council[4]. Invoking the UN Charter gives more weight to the idea of "responsibility to protect". But it is not at all clear who – the General Assembly or the Security Council – has the preeminence in making this decision. Moreover, in the Charter articles that have been invoked (11, 12, 14, 15, 41, 42, 53) there is no mention

[1] UN Security Council Resolution no. 1973, 17 March 2011, S/RES/1973 (2011), par. 4.
[2] *Implementing*...cit., par. 56.
[3] *Ibidem*, par. 63.
[4] *Ibidem*, par. 56.

of violence committed *inside* states, but only of situations of *inter-state conflict*. Thus, the situation of an intervention in internal conflicts is in no way covered by the UN Charter.

Whose Responsibility to React? A Political Assessment

Who are the actors supposed represent the international community and to assume the "responsibility to react" in order to defend the values of human rights, international peace and security? This is a deeply political question. The choice of actors will never be motivated solely by moral or legal considerations, as long as international politics are an autonomous sphere of human action[1]. Knowing that political decisions are rarely motivated by moral considerations, the problem of the actors which should assume the responsibility to protect is becoming even more relevant from the point of view of the legitimacy of the reaction.

Two questions are salient when thinking about the decision of engagement of the "responsibility to react": first, the question of the institutional competition between the different UN institutions (and above all, between the Security Council and the General Assembly), that will try to increase their sphere of competence and their influence by using this leverage; second, the question of the competition between the regional organizations that should be charged by the Security Council to put an end to human rights violations covered by the responsibility to protect.

According to the Report of the Secretary General, the international actors who might assume the responsibility to react can be the following: the Secretary General himself, without authorization of the Security Council, when it comes to pacific means[2]; the General Assembly, the Security Council, regional organizations and even individual states[3] and the civil society[4]. Each of these types of actors raises specific problems, either in terms of legitimacy, or in terms of capacities.

Let's start our analysis with the Security Council. Its legitimacy is already put under question on a certain number of aspects. This is due to its composition, which is said not to represent the reality of today's international politics anymore[5], but also to the decision-making procedure. One of the most frequent criticisms addressed to the Security Council is that the five permanent members are no longer representative for the international balance of power. Secondly, the veto issue always obstructs a possible engagement of the responsibility to react in cases where it is precisely one of the permanent members who does not fulfill its responsibility towards its citizens. The difficult consolidation of the rule of law in Russia or China allows us to imagine situations – hypothetical, of course – in which the Security Council might be put in a position to examine situations in Chechnya or Tibet, without being able to make a decision because of the veto power of the concerned states. The opposite situation is also imaginable: one of the permanent members might try to force a decision of

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[1] Hans MORGENTHAU, *Politics Among Nations*, Alfred A. Knopf, New York, 1948.

[2] *Implementing*...cit., par. 51.

[3] *Ibidem*, par. 61.

[4] *Ibidem*, par. 59.

[5] Carolyn WILLSON, "Changing the Charter: the United Nations Prepares for the Twenty-first Century", *The American Journal of International Law*, vol. 90, no. 1, Jan. 1996, pp. 115-126.

intervention by presenting alleged "evidence" of the four crimes that enter the scope of the international responsibility to protect populations (let us remember the attempt of Collin Powell to convince the Security Council of the existence of WMD in Iraq!). Theoretical analyses of cases of UN intervention in different conflicts show that these decisions are almost never disinterested[1].

The General Assembly might enjoy greater legitimacy in terms of political representation. But not in legal terms, however, because the competences conferred upon it by the Charter do not cover decisions of military intervention, especially *inside* states. Moreover, the binding force of the GA resolutions is politically weaker than that of the Security Council resolutions. But the General Assembly is an organ which takes decisions through deliberation, and not through negotiation, as the case of the Security Council[2]. This is why the GA might prove a more representative organ for the interests of the international community in its entirety. But there are other, technical obstacles which transform the GA into a rather weak actor: we are thinking particularly to the slowness of the process of decision-making; or, the speed of the reaction is a key factor in crisis situations.

The means at the disposal of the Secretary General are in their turn rather limited. He/she can react especially in matters of early warning, diplomatic mediation, and monitoring potentially dangerous situations; but the effective instruments of reactions are completely unavailable for him/her.

The member states do not have legitimacy to react, unless they do it in a collective effort. Even though the decision to get involved is individual, the decision to react and the means of reaction must be collective, in order to correspond to imperatives of international legality and legitimacy. However, states have sometimes an important stake in promoting the principle of the responsibility to protect at the international level. We are thinking of the case of Canada, which is one of the greatest promoters of this principle in international law and practice.

After the end of the second World War, Canada made continuous efforts to secure its middle power status. After its attempts to include in the Charter a recognition and a special status for the middle powers, Canada has shifted to other ways of promoting its position. It argued that middle powers used their power in a responsible manner, to the best interest of the world community[3], without being susceptible of using their leverage in order to satisfy their own selfish interests, as great powers do. This is Why Canada promoted, at the UN, an approach oriented towards peace-keeping. During the period 1948-1990, Canada is the state with the most important contribution to peace-keeping missions, taking part in 17 of the 18 UN actions of this type[4]. Canada, along with other middle powers having a neutral status, such as Sweden, Finland, Norway, India, Australia etc. are interested in maintaining the status quo, in enforcing

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[1] Laura NEACK, "UN Peace-Keeping: In the Interest of Community or Self?", *Journal of Peace Research*, vol. 32, no. 2, May 1995, pp. 181-196.

[2] On the fundamental different paradigms of the two modes of decision-making, see Paul MAGNETTE, "Deliberation or Negotiation? Forging a Constitutional Consensus in the Convention on the Future of Europe", in Erik O. ERIKSEN, John FOSSUM, Agustin MENENDEZ (eds.), *Developing a Constitution for Europe*, Routledge, London, 2004.

[3] R.A. MACKAY, "The Canadian Doctrine of the Middle Powers", in H.L. DYCK, H.P. KROSBY (eds.), *Empire and Nations*, University of Toronto Press, Toronto, 1969, pp. 133-143/ p. 137.

[4] Laura NEACK, "UN Peace-Keeping…cit.", p. 186.

international law, as well as in a steady increase of their prestige through the promotion of this doctrine of peace. The doctrine of the responsibility to protect is part of the same political line. This is why it is not surprising that Canada has been the main promoter of the notion of "responsibility to protect", the initiator of the process of reflection and the creator of the ICISS. Being the main supporter of the peace-keeping missions, Canada might also have the political will to become the leader of a group of middle powers that could assume the responsibility to react in cases of genocide, crimes against humanity, war crimes and ethnic cleansing, because the support to the consolidation of international law will constitute, in the future as in the past, the best warranty of their status in international affairs. Moreover, from their middle power position, states like Canada can have more legitimacy to intervene in such cases than great powers.

This type of reasoning can also be applied to emerging regional organizations (such as the African Union). If an organization like NATO has lost a lot of its credibility after the intervention in Kosovo, in 1998-1999, without a Security Council mandate, as well as because of the US hegemonic leadership, other international organizations can reinforce their role by acting as UN instruments in the protection of civilians against massive human rights violations. The regional organizations can act if the Security Council decides to assign them to react on the basis of Chapter VII of the Charter. The contribution of the African Union, for example, has already been "welcomed" by the Security Council for its efforts directed at insuring civilian protection in armed conflicts[1]. Besides, we should note that the African Union constitutive act provides, in article 4(h), the right of the Union to intervene in a member state, upon decision of the Conference, in certain serious circumstances, such as war crimes, genocide and crimes against humanity[2]. The participation in such operations is important for any regional organization that tries to strengthen its status in international politics: it is a means of increasing its influence, but also of consolidating the links between its members through this engagement in a common effort. It is also a test for the cohesion and capabilities of an organization, which has thus the occasion of proving what it is capable of.

The practice also consecrated another important role for regional organizations as "gate-keepers". This was the case for the intervention in Libya, when the Security Council relied upon expertise and recommendations of the Arab League, the Gulf Cooperation Council and the African Union before deciding the drafting of the Resolution 1973[3]. However, the neutrality of the position of these organizations is questionable, since their opinions and recommendations heavily depend on the relations between the member states and the state concerned. Thus, the Arab League, which traditionally kept a safe distance from interfering in its members' internal affairs, may have taken stance on Libya because of the tensions between Al-Gaddafi and most of the Arab leaders. The Arab League has been so far very reluctant to pronounce itself in favor of an international intervention in Syria, where human rights abuses could also meet the objective criteria for the engagement of the international

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[1] UN Security Council, Resolution 1674/2006.

[2] *The Constitutive Act of the African Union*, art. 4(h), http://www.africaunion.org/root/au/AboutAU/Constitutive_Act_en.htm#Article4, retreived on 22 February, 2012.

[3] Alex J. BELLAMY, Paul D. WILLIAMS, "The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect", *International Affairs*, vol. 87, no. 4, 2011, pp. 825-850.

responsibility to protect. But since the situation in Syria is politically different from that of Libya, we are unlikely to witness an international intervention at any time soon.

CONTENT AND CRITERIA OF THE RESPONSIBILITY TO REACT

The responsibility to protect pertains above all to the sovereign state, which must take the adequate measures if one of the following situations arises on its territory: genocide, war crimes, crimes against humanity, or ethnic cleansing. When the state is not able to do it, it can ask the assistance of the international community. We will not get into details regarding these two situations, as they don't raise problems from the point of view of international legality or legitimacy. The third compound of the responsibility to protect – that is, the responsibility to react, is what preoccupies us most in this study. The responsibility to react of the international community is engaged if the state is "manifestly" incapable of assuming its own responsibility, or if it is itself the perpetrator of the four above-mentioned crimes. From this point of view, the responsibility of the international community is only *complementary* to the responsibility of the state. This raises a problem about the precise moment when the international reaction should be engaged: which is the point from which it becomes "manifest" that the state will not assume its responsibility to protect? A subsequent difficulty arises when the international community decides to act in the absence of a specific request from the concerned state, because the latter can argue that the international responsibility has been engaged too soon. On the other hand, waiting for the incapacity of reaction of the state to become "manifest" can significantly delay the international reaction, in a situation where every minute is essential for saving lives. This difficulties have become apparent in practice in the Darfour crisis[1].

Another problem is related to the qualification of a situation as being a "genocide", "war crime", "crime against humanity" or "ethnic cleansing". Defining a situation as pertaining to one of these categories in not a simple intellectual operation: it is a profoundly political gesture. Certain states can qualify an event as being a "genocide", while other can refuse to do so. A legal definition of the first three has been, however, given in the statute of the International Criminal Court[2], but this only applies to cases brought before it: the Court cannot pronounce itself *ex officio* on international events happening in real time.

In these conditions, which are the criteria that justify the reaction of the international community, and which are the means at its disposal for appropriate action?

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[1] Alex J. BELLAMY, "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq", *Ethics and International Affairs*, vol. 19, no. 2, 2005, pp. 31-54.

[2] Rome Statute of the International Criminal Court, 2001, http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf, retrieved on January 15, 2012.

Criteria of Legitimacy

The criteria of legitimacy of the reaction, as they have been stated in the different documents on the responsibility to protect, can be traced back to the just war doctrine[1]. They belong to a tradition of reflection in international legal philosophy, which gives them a significant weight. However, these criteria often lack precision, leaving room for interpretation by different actors, which act depending on their own interest in the matter.

Based on paragraphs 138 and 139 of the 2005 World Summit Outcome Document, the Report of the Secretary General establishes two preconditions for an intervention under Chapter VII of the Charter: when the state in question doesn't manifestly insure the protection of the population, and when the pacific means prove inadequate[2]. Let alone these precisions, the report does not go further in defining precise criteria; on the contrary, it states that a "rigorous definition" might only restrict the capacity of reaction of the international community. The UN and the other actors involved (regional and sub-regional organizations, national actors) should "remain focused on saving lives through 'timely and decisive' action, not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results"[3]. In its turn, the ICISS establishes a "just cause threshold" for military intervention, as well as four "precautionary principles". It continues by a list of "operational principles" which should guide the reaction.

The just cause threshold supposes the existence of massive human rights violations, under the form of considerable losses of human lives or large scale ethnic cleansing. But the interpretation of words like "considerable" or "large scale", when it comes to human lives, is open. This is why intervention can only be decided on a case-by-case basis. Consequently, there is no *legal obligation* to react of the international community, because the defining criteria for a situation that justifies a reaction are not very clear. One can argue, instead, that there is a moral obligation. The emphasis on this obligation, in political declarations of states or regional and international organizations, can lead, in time, to the emergence of an international legal norm. On the other hand, the international actors should think twice before contributing to the emergence of a positive legal norm that would compel the international community to react in cases when a state does not assume the responsibility to protect its population.

The "precautionary principles" established by the ICISS report concern the right intention, the last resort, the proportionality of means and reasonable prospects for success. The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned[4]. The military means should only be used when it becomes obvious that all other types of reaction don't have any result; they should be proportionate to the seriousness of the situation, and the international community should make sure

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[1] Michael WALZER, *Just and Unjust War. A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977.

[2] *Implementing*...cit., par. 49.

[3] *Ibidem*, par. 50.

[4] ICISS, *The Responsibility to Protect*, p. XII.

that "the consequences of the action [are] not likely to be worse than the consequences of inaction"[1].

The operational principles for military intervention established by the ICISS offer the framework of the practical issues of the action:

> "A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.
>
> B. Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.
>
> C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.
>
> D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.
>
> E. Acceptance that force protection cannot become the principal objective.
>
> F. Maximum possible coordination with humanitarian organizations"[2].

The Instruments of Reaction

The Report of the Secretary General does not treat in depth the question of the criteria which should be considered when deciding an international reaction. The text states that an intervention is needed "when as state is manifestly failing to provide protection" (par. 11). The Report insists a lot on the means of action at the disposal of the international community. The use of these means should be gradual, starting with the most pacific and only using military means as a last resort. What is important is the existence of a "strategy of early and flexible response" (par. 12) which should be put in practice before the use of force becomes necessary.

Some of the reaction measures taken under UN jurisdiction can be taken by the Secretary General without even having the agreement of the Security Council, but based on regional or sub-regional agreements: this is what happened in Kenya in 2008, when a serious crisis has been prevented by the UN reaction. The personal diplomacy of the UN Secretary General is a less coercive instrument, which avoids the risk of irritating the sovereignty sensibilities of the concerned States. This is why personal diplomacy is one of the most used instruments in the practice of the responsibility to protect.

The UN can also establish investigation missions, which can be also "an occasion to directly address a message to the decision-makers in the name of the international community" (par. 53). Other, more resolved, actions can be undertaken afterward: direct requests to the decision-makers to put an end to incitements to violence; the jamming of radio and TV broadcasts (for example, the radio broadcasts have been one of the most effective instruments of mobilization for the Rwandan genocide); UN broadcasts to send a positive message etc.

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[1] *Ibidem*, p. XII.
[2] *Ibidem*, p. XIII.

Diplomatic sanctions are a step further for the cases when all the measures mentioned above don't give results: these are the exclusion of the representatives of the infringing State from international and regional multilateral fora, restriction of movement and financial transfers, embargo on luxury products or weapons (par. 57).

Finally, the Report of the Secretary General recognizes that the "weakness of means" (par. 60) is one of the most salient problems of the international community when it comes to the responsibility to protect; the other is "lack of will".

CONCLUSION: WHAT PROSPECTS FOR THE NOTION AND THE PRACTICE OF R2P?

The Report of the Secretary General, as most of the UN diplomatic documents, is quite soft when assessing the effectiveness of the reaction of the international community to the breaches of the responsibility to protect. Actually, the concept has been criticized for two different types of reasons: on the one hand, the content of the concept; on the other hand, the ineffectiveness of the international community in managing situations that fall under this title. There is no actual consensus, among international lawyers or among decision-makers, on the content of the responsibility to protect. The concept is vague and insufficiently defined. It is not yet an international norm in the real sense of the term. When it comes to its implementation, the criteria for an international reaction are very relative and leave room for different interpretations. This is why the "responsibility to protect" can conceal great power interventionism, as has been the case during the "Arab spring". When the economic or strategic interests of the great powers are not a stake, there is not an authentic political will of the international community to react to massive human rights violations. In these conditions, there is a real possibility that groups of international mercenaries could be hired by certain interest groups in order to provoke conflicts that would request an international intervention under the "responsibility to protect"[1]. And, last but not least, the competence of the decision-making is disputed between the General Assembly and the Security Council. For all these reasons, the notion that has been discussed all through this article has a long way to becoming an enforceable legal norm, but it has all the chances to be rhetorically used in order to legitimize foreign intervention.

One cannot conclude the assessment of the evolution of the notion of "R2P" before pointing to some criticisms that have been brought both to the formal conceptualization of the notion, and to its practical implementation. In what concerns the legal texts, for example, Carsten Stahn underlines the fact that there are important differences in the way they approach the subject, which lead to differences in understanding the content of the notion (the ICISS Report, the High-Level Panel Report, the Outcome Document of the 2005 Millennium Summit and the Report of the Secretary General)[2]. If there is indeed an agreement among states, the UN and the international civil society on

[1] Alan J. KUPERMAN, "Rethinking the Responsibility to Protect", *The Whitehead Journal of Diplomacy and International Relations*, Winter-Spring 2009, pp. 19-29.

[2] Carsten STAHN, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", *The American Journal of International Law*, vol. 101, no. 1, Jan. 2007, pp. 99-120.

accepting the fact that sovereignty entails responsibility, differences of approach come up as soon as the notion of "responsibility to protect" appears in the public discourse. This leads, on one hand, to its legal ambiguity, but also, on the other hand, to its wide acceptance as a principle, because everyone gives it the most suited meaning from their own perspective[1].

Other theorists emphasize the fact that the most important flaw of the "responsibility to react" is not necessarily its lack of legal basis, but on the contrary, the lack of political will. In the absence of political will, the utility of the concept is only marginal in international affairs[2]. The international reaction, in the name of humanitarian rationales, is undermined by two important dangers which put its legitimacy in question: the relativity of the criteria for reaction and the subjectivity of those who intervene[3].

As the Libyan case has shown, the insufficient development of the legal doctrine of the responsibility to protect, as well as its unsatisfactory codification in international law, creates an ambiguity which is used by the Security Council to decide on a case by case basis. Moreover, the field implementation of the Council's decisions is itself very little detailed in the Resolutions – leaving much room for those who act on the spot. Taking these decisions on a case by case basis makes them more flexible for ground action, but the logic of a uniform application of law is undermined: the law loses its objective and universal character. Thus, the responsibility to protect is thrown back to politics and to a logic of interest and power.

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[1] *Ibidem*, p. 118.

[2] Jean-Marie CROUZATIER, "Le principe de la responsabilité de protéger: avancée de la solidarité internationale ou ultime avatar de l'impérialisme?", *Aspects – Dossier thématique "Responsabilité de protéger"*, no. 2, 2008, pp. 13-32.

[3] *Ibidem*, pp. 22-24.